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In The
Supreme Court of the United States

CAVEL INTERNATIONAL, INC., *et al.*,

Petitioners,

v.

LISA MADIGAN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICUS CURIAE* OF LIVESTOCK MARKETING ASSOCIATION IN SUPPORT OF PETITIONERS

PHILIP C. OLSSON
Counsel of Record
KATHRYN E. BALMFORD
OLSSON FRANK WEEDA
TERMAN BODE MATZ PC
1400 Sixteenth Street, NW
Suite 400
Washington, DC 20036
(202) 789-1212
(202) 234-3550 – facsimile

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF OF LIVESTOCK MARKETING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of the Livestock Marketing Association.[1]

I. INTEREST OF *AMICUS CURIAE*

The Livestock Marketing Association ("LMA") is a national trade association with its principal office in Kansas City, Missouri. LMA has served the interests of the livestock market industry since 1947. Its members are more than 800 rural auction markets at which cattle, horses, sheep and other species are bought and sold for various purposes, including feeding and slaughter.

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Petitioners Cavel International, Inc., et al. ("Cavel") and respondents Lisa Madigan, et al. have consented to the filing of this brief. The correspondence regarding the Livestock Marketing Association's requests for consent have been filed in the office of the Clerk.

This brief was authored by outside counsel for the *Amicus*. Counsel for a party did not author this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation and submission of this brief. No person or entity, other than LMA and its members, the National Cattlemen's Beef Association, the Texas and Southwestern Cattle Raisers Association, the Texas Cattle Feeders Association, and the Kansas Livestock Association made a monetary contribution intended to fund the preparation and submission of this brief. *See* SUP CT R 37.6.

The *Amicus* and its members are interested in assuring that equines are treated as humanely as possible, and they support the petition for a writ of certiorari as a means of restoring the applicability of the Humane Methods of Slaughter Act of 1958, 7 U.S.C. §§ 1901-1907 (amended 1978) – which requires that horses, cattle and other animals slaughtered under USDA inspection, be "rendered insensible to pain" prior to being killed (7 U.S.C. § 1902(a); *see also* Federal Meat Inspection Act § 3(b), 21 U.S.C. § 603(b)) – to the 40,000-60,000 horses per year which have effectively been exempted from the scope of the Act by the Illinois statute and the decision of the Court of Appeals below.

II. SUMMARY OF ARGUMENT

This *amicus curiae* brief is submitted in support of petitioner's request for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The petitioner raises two issues in its request:

1) Whether a court may substitute its own speculative rationale unsupported in either the court or legislative record to uphold the statute's constitutionality; and

2) Whether the Constitution's Commerce Clause which provides Congress with plenary power "to regulate Commerce with foreign Nations, and among the several States" invalidates a state statute

that outlaws commerce in an otherwise lawful product, which originates in interstate commerce and is intended solely for export overseas.

This brief addresses both questions presented.

III. ARGUMENT

A. THE COURT OF APPEALS FAILED TO ADDRESS THE ADVERSE IMPACT OF THE ILLINOIS STATUTE, WHICH EXEMPTS THE SLAUGHTER OF 40,000-60,000 HORSES EACH YEAR FROM THE APPLICATION OF THE HUMANE METHODS OF SLAUGHTER ACT

The Illinois statute at issue here has closed the petitioner's Illinois meatpacking facility with the result that 40,000-60,000 horses previously slaughtered each year at that facility will no longer be slaughtered in accordance with the federal Humane Methods of Slaughter Act of 1958, 7 U.S.C. §§ 1901-1907 (amended 1978) (hereinafter "Humane Slaughter Act"), which requires that an animal be "rendered insensible to pain" before it is killed. 7 U.S.C. § 1902(a).

The Humane Slaughter Act only applies at slaughterhouses in the United States, and does not apply to the animals which are killed by their owners or by veterinarians, or to animals which die from "natural" causes such as malnutrition or neglect or which are exported for slaughter in Mexico or Canada. 21 U.S.C.

§ 623(a). The Illinois law and the decision of the Court of Appeals have provided an incentive for the export of horses to foreign slaughterhouses, and are contributing factors to an increase in cases of equine neglect. *See* Catrin Einhorn, *Horses Spared in U.S. Face Death Across the Border*, N.Y. TIMES, Jan. 11, 2008, at A9; Paulo Prada, *Leaner Pastures: As Horses Multiply, Neglect Cases Rise*, WALL ST. J., Jan. 7, 2008, at A1; *see also* "Unwanted Horses and the AVMA's Policy on Horse Slaughter," American Veterinary Medical Association's Web Site, http://www.avma.org/issues/animal_welfare/unwanted_horses_faq.asp.

The loss of meat inspection was addressed by the Court of Appeals (*see Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 553-54 (7th Cir. 2007)), but the critical statutory issue is rather the loss of Humane Slaughter Act coverage, which is linked to meat inspection. *See* 21 U.S.C. § 603(b). The Court of Appeals thus failed to address the adverse impact of the Illinois statute on tens of thousands of horses which will die each year because they are at the end of their useful lives, but which will now die of neglect or be killed using procedures which are outside the protection accorded by the Humane Slaughter Act.

While procedures for killing other livestock, such as cattle, swine and sheep, will continue to be covered by the Humane Slaughter Act so that these animals will be "rendered insensible to pain" prior to their death, these humane slaughter requirements are unlikely to ever again be applied to horses in the United States as a consequence of state laws closing

two equine slaughterhouses in Texas, *see Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir. 2007), *cert. denied*, 127 S. Ct. 2443 (2007), and now the last U.S. equine slaughterhouse in Illinois.

The present petition provides the Court's last and only opportunity to restore the availability of Humane Slaughter Act coverage in connection with horses.

B. THE COURT OF APPEALS ERRED IN UPHOLDING THE ILLINOIS STATUTE AS "SUPPORTED IF SOMEWHAT TENUOUSLY BY A LEGITIMATE STATE INTEREST," AND THEREFORE SUFFICIENT TO DISPLACE THE OPERATION OF BOTH THE INTERSTATE AND FOREIGN COMMERCE ELEMENTS OF THE COMMERCE CLAUSE

The Court of Appeals upheld the Illinois statute because it found it to be supported "somewhat tenuously by a legitimate state interest," using exactly the same words which this Court used in *Pike v. Bruce Church, Inc.*, to reach a different result:

> [W]e may assume that the asserted state interest is a **legitimate** one. But the State's **tenuous** interest . . . cannot constitutionally justify the requirement [of the State law]. . . .

397 U.S. 137, 145 (1970) (emphasis added).

In the present case, not only is the state's interest, "tenuous," but also must be balanced against the state law's interference with the Humane Slaughter Act. The *de facto* exemption of the slaughter of 40,000-60,000 horses per year from the provisions of the Humane Slaughter Act more than outweighs the "somewhat tenuous[ ] . . . state interest" identified by the Court of Appeals. *Cavel*, 500 F.3d at 558. Therefore, the speculative rationalizations which that Court used to justify the constitutionality of the Illinois statute are insufficient to justify any burden on either foreign commerce or interstate commerce.

C. BY ALLOWING STATE LEGISLATION, WHICH IS NOT DIRECTLY PROTECTIVE OF THE HEALTH OR SAFETY OF THE LEGISLATING STATE'S CITIZENS, TO DISPLACE THE CONSTITUTIONAL RIGHTS OF CITIZENS OF OTHER STATES TO PARTICIPATE IN INTERSTATE AND FOREIGN COMMERCE, THE DECISION OF THE COURT OF APPEALS IS NOT ONLY IN ERROR, BUT ALSO IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT IN *NATIONAL FOREIGN TRADE COUNCIL V. NATSIOS*, 181 F.3d 38 (1st Cir. 1999)

As the petitioners have ably demonstrated, the Illinois statute at issue here creates an unconstitutional burden upon the foreign commerce of the

United States, and the decision of the Court of Appeals upholding that statute is in conflict with the decision of the United States Court of Appeals for the First Circuit in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999). *See* Petition for Writ of Certiorari, *Cavel* (No. 07-962) at 20-21.

The Illinois statute also creates an unconstitutional burden upon the interstate commerce conducted at livestock markets, which previously were suppliers of horses to Cavel. The decision of the Court of Appeals raises the issue of the extent to which state legislation not directly protective of the health or safety of the citizens of the legislating state can displace the rights of citizens of other states to participate in interstate and/or foreign commerce. Certainly this was a key issue in *Pike v. Bruce Church, Inc.*, where this Court found an impermissible burden on interstate commerce where "the State's interest [was] minimal at best . . . " (397 U.S. at 146) and "legitimate," but "tenuous" (*id.* at 145). In the present case, the Court of Appeals found a "tenuous" state interest sufficient to justify an intrusion upon commerce. *Cavel*, 500 F.3d at 558.

The Court of Appeals points to its decision in *National Paint & Coatings Ass'n v. City of Chicago* as acknowledging that, "even in the absence of discrimination, a burden on interstate commerce that ha[s] no rational justification would be invalid." *Cavel*, 500 F.3d at 556 (citing 45 F.3d 1124, 1131 (7th Cir. 1995)). To illustrate its point, the Court cites the Illinois mud guard law invalidated in *Bibb v. Navajo Freight*

Lines, Inc., as an example of a State law that was invalidated despite a lack of disparate treatment. *Id.* (citing 359 U.S. 520 (1959)).

In *Bibb*, the Court stated:

> Local regulations which would pass muster under the Due Process Clause might nonetheless fail to survive other challenges to constitutionality that bring the Supremacy Clause into play. Like any local law that conflicts with federal regulatory measures (*Public Utilities Commission of State of California v. United States*, 355 U.S. 534 . . . ; *Service Storage & Transfer Co. v. Commonwealth of Virginia*, 359 U.S. 171 . . .) state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow.

Id. at 529.

In *Quill Corp. v. North Dakota*, in distinguishing between constitutional concerns and policies underlying the Due Process and Commerce Clauses, the Court stated:

> [T]he Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure

> for these structural ills. *See generally* THE FEDERALIST NOS. 7, 11 (A. Hamilton). It is in this light that we have interpreted the negative implication of the Commerce Clause.

504 U.S. 298, 312 (1992).

In summary, the tenuous interest of the State of Illinois in expressing its displeasure with the Belgian and French practice of consuming horsemeat (which Judge Posner points out "was until recently an accepted part of the American diet" (*Cavel*, 500 F.3d at 552)) does not provide a sufficient basis for burdening either foreign commerce or interstate commerce.

At a minimum, the Court should grant the petition for review to eliminate the conflict between this decision from the Seventh Circuit and the decision of the First Circuit in *National Foreign Trade Council*. *See* Petition for Writ of Certiorari, *Cavel* (No. 07-962) at 20-21.

IV. CONCLUSION

The petition for writ of certiorari should be granted for three reasons:

1. It will provide this Court's last and only opportunity to restore the availability of the protections of the Humane Slaughter Act for equines in this country. Horses will continue to die and be killed, but none of these deaths will be subject to a federal requirement that the animal first be "rendered insensible to pain."

2. The State's tenuous interest in the statute at issue is insufficient to support a burden upon interstate and/or foreign commerce, particularly where that "tenuous" interest must be balanced against the statute's effect of making unavailable the protections of the Humane Slaughter Act.

3. The decision of the Court of Appeals has created a conflict with the prior decision of the First Circuit in *National Foreign Trade Council*, and that conflict needs to be resolved.

Respectfully submitted,

PHILIP C. OLSSON
Counsel of Record
KATHRYN E. BALMFORD
OLSSON FRANK WEEDA
TERMAN BODE MATZ PC
1400 Sixteenth Street, NW
Suite 400
Washington, DC 20036
(202) 789-1212
(202) 234-3550 – facsimile

Counsel for Amicus Curiae